IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 2 OF 2005

Shri Sadanand Vishnu
Shirodkar, Aged 32 years,
R/o House No.59,
Gawaswado, Ibrampur,
Pernem-Goa. ... Appellant

versus

State
through Public Prosecutor. ... Respondent

Mr. R. Menezes, Advocate for the Appellant.

Ms. W. Coutinho, Public Prosecutor for the Respondent.

CORAM : N. A. BRITTO, J.

DATE :10TH AUGUST, 2006.

ORAL JUDGMENT

This appeal is by the accused who was charged and tried under Section 302 I.P.C. but who has been convicted and sentenced under Section 304(I) I.P.C.

2. The accused, aged 34 years, and the deceased/Gurudas Gawas, aged 28 years, were residents of Gawaswaddo, Ibrampur in Pernem Taluka. The ward Gawaswaddo of Village Ibrampur, appears to be a locality having about 28 houses, including that of the accused as well as the deceased, within a radius of about 50 meters or so. The place of incident is a pathway in between the common well and a cowshed and beyond that there is the house of the accused at a distance of about 10.5 meters, as stated by Raghoba Naik/PW1 and as seen from the sketch-Exh.35 drawn by Satyavijay Parab/PW13. It appears that the relations between the families of the accused and the deceased were strained for about two months prior to the incident on account of complaints filed by the brother of the accused against the deceased and his family. In fact, the deceased and his family members were called by the Police for inquiry in the light of the said complaints on 8-5-2000 and the incident itself took place on 7-5-2000 at about 6.45 p.m. as the deceased/Gurudas was returning home from his field with a bundle of grass/leaves on his head.

3. According to the prosecution, when the deceased

reached near the said common well, the accused came with a pal koita in his hand and caught hold of the deceased and pushed him on the ground and then gave a blow of pal koita/MO6 with both his hands on his right thigh due to which the deceased sustained a bleeding injury. The news of assault upon the deceased spread immediately. Rajaram/PW2, the brother of the deceased, who was an Ex-Sarpanch and a panch of the Village at the time of the incident, came to know about the incident through Sainath Gauns/PW9 as he was sitting in a hotel/teashop of Vassant Gawas and he immediately requested Sainath Gauns/PW9 to arrange for a vehicle to take the deceased/Gurudas to the hospital and he along with others including Raghoba Naik/PW1 proceeded to lodge a complaint in a rickshaw, arranged by them. On their way to the Police Station, at Hankane they saw the Police jeep proceeding towards Ibrampur and they returned back along with the Police. It appears that the Police had received a message about the assault by the accused. Sainath Gauns/PW9 took the deceased/ Gurudas to Kasarwada Health Centre by a mini bus named Laxminarayan but the deceased was not admitted there and was directed to be taken to Goa Medical College where the doctor declared the

deceased as brought dead. Rajaram Gawas/PW2 in the meanwhile proceeded to Pernem Police Station by Tata Sumo where he came to know that his brother had expired and lodged a complaint which was recorded at about 10.00 p.m. whereupon the I.O.Shri Mapari/PW16 came back to the scene, but as stated by him, did not carry out the scene of offence panchanama due to darkness and directed A.S.I. Sawant and staff to guard the scene. Shri Mapari/PW16 did not find the accused at his house and therefore he secured the presence of the brother of the accused by name Naresh Shirodkar who was working as a Police Constable at Mapusa and proceeded in search of the accused at the houses of his relatives, and as stated by him, at about 3.30 a.m. or so, the accused was traced at Hadus. Shri Mapari/PW16 stated that the accused started running on hearing the noise of the jeep and as he was running the accused fell down and sustained minor injuries to his head.

4. The accused was brought to the Police Station and arrested. At the time of arrest of the accused, the clothes worn by the accused namely a short pant/MO7 and a towel/MO8 were attached by Shri Mapari/PW16 in the presence of Joaquim

Lobo/PW6 at about 4.30 a.m. or so on 8-5-2002. In the presence of Raghoba Naik/PW1 a scene of offence panchanama was drawn at about 9.00 a.m. on 8-5-2000. Needless to observe the scene of offence is near the said pathway in between the common well and the cowshed, from where Shri Mapari/PW16 attached one pair of rubber slippers/MO3 and a single slipper of right leg/MO4 and a 5 rupee coin. Shri Mapari/PW16 also took two samples of mud, one mixed with blood/Exh.1 and one without it/Exh.2.

5. The investigations continued and after completion a chargesheet was filed against the accused under Section 302 I.P.C.

6. In the trial, the prosecution examined 16 witnesses to prove its case. The accused examined 3 witnesses, all Medical Officers, in defence.

7. As already stated, the scene of offence panchanama was conducted in the presence of Raghoba/PW1 at about 9.00 a.m. on 8-5-2000. According to Raghoba/PW1, Ajit/PW4 is a

resident of the same ward who was present and had shown the place of incident as between the places where there was a cowshed and a well. Ajit/PW4 has confirmed that he had shown the place of incident to the Police. Although he has stated that he did not recollect the names of the panch witnesses, one Mohan Naik and Deelip Halarnkar were present at that time. At the same time, he stated that he went away after showing the place of incident to the Police and he was not even present when the photographs were taken. In fact, the photographs were produced through Raghoba/PW1. Ajit/PW4 in his cross-examination stated that the accused was present at the place of incident along with the Police when he reached there. It is submitted on behalf of the accused, that in case the accused was present to show the scene to the Police there was no question of Ajit/PW4 being called there to show the scene of offence, as stated by Raghoba/PW1. There is nothing in the evidence of Raghoba/PW1 or for that matter in the evidence of Shri Mapari/PW16 even to remotely suggest that at the time when the panchanama was drawn the accused was present along with the Police party at the scene of offence and therefore one need not place much significance on the statement of Ajit/PW4

regarding the presence of accused, to disbelieve Raghoba/PW1 or Shri Mapari/PW16. The said statement of Ajit/PW4 appears to be an improvement in his version and otherwise does not sound to be probable, considering the other facts of the case. It is also pointed out on behalf of the accused that if two samples of mud were taken from the scene, one with blood and the other without blood, both the samples could not have been found, when sent to CFSL, Hyderabad, with human blood. It is contended that the fact that both the said samples of mud have been found with blood creates sufficient doubt as to the veracity of the case of the prosecution, the same having been taken from the scene of offence. It is quite probable that considering the injuries suffered by the deceased the blood was all over the place where the body of the deceased was found and it is also quite probable that the sample of mud which according to the I.O. Shri Mapari/PW16 he took as plain sample was indeed having stains of blood in it and for that reason both the samples were found with blood when sent to CFSL, Hyderabad. The accused is entitled to only a reasonable doubt. The fact that both the samples were in fact found with human blood is not sufficient to create any doubt as regards the scene of offence panchanama

and the evidence of Raghoba/PW1 and the I.O. Shri Mapari/PW16. In fact, there was no dispute at all as regards the place of the incident.

8. The case of the prosecution is based on the evidence of 3 eye witnesses, namely Ajit/PW4, Dattaram/PW5 and Santosh/PW7. The case of the prosecution is also based on circumstantial evidence namely the recovery of the pal koita/MO6 at the instance of the accused and the towel/MO8 having been found with human blood regarding which the accused has offered no explanation. The case of the prosecution is also based on the evidence of other witnesses which we may call supporting evidence, which further corroborates the evidence of the said 3 eye witnesses, referred to hereinabove.

9. To prove its case that the death of the deceased was homicidal, the prosecution examined Dr. Sapeco/PW11. According to the accused, the death of the deceased was accidental. As far as the injuries on the accused are concerned, according to the prosecution they were sustained by him, as the accused in an attempt to run, fell down and sustained the same.

However, as per the accused he had sustained the said injuries when he was assaulted by the family of the deceased. As far as the defence of the accused goes, the accused chose to remain silent when he was examined under Section 313 of the Code of Criminal Procedure, 1973(Code, for short) as regards the injuries on him. The defence of the accused, as can be gathered from the cross-examination and suggestions put to the prosecution witnesses is that there was an enmity between both the families, of the accused and the deceased. The accused and his brothers had lodged several complaints against the deceased and his family members and no action was taken by the Police. It was the case of the accused that on the relevant date about 25 to 30 members of the Gawas family, which includes the deceased, came to his house armed with dandas and stones and damaged his house and one of the members of the Gawas family assaulted the accused by giving a blow of danda on his head and the accused managed to run away from the house after which his sister was locked inside the house and thereafter there was some noise and upon hearing the noise the members of the Gawas family came running in all directions and the deceased/Gurudas who was returning home with a bundle of grass/leaves on his

head also started running in the said direction, he slipped and fell on the koita which was in the bundle of grass and as a result sustained the said injury on his thigh. The accused stated that he was falsely implicated. As far as the enmity between both the families is concerned there appears to be no dispute as regards the same as the families of the accused and the deceased had a dispute as regards a right of way and about two complaints were previously filed against the family of the deceased and not only that the Police had called some of the members of the family of the deceased for inquiry on the next date. The accused did not even specify as to which of the members of the Gawas family had assaulted him to cause the said injury and gave no explanation whatsoever as to why he did not even lodge a complaint as regards the said incident of assault upon him or upon his house. The medical evidence produced on behalf of both the parties namely of Dr. Sapeco/PW11 as well as the medical evidence produced on behalf of the accused namely of Dr. Ram Swamy/DW1, Dr.Deelip/DW2 and Dr.Rajan/DW3, shows that the accused was examined prior to 11.35 a.m. on 8-5-2002 by Dr. Satish Pednekar at the upgraded Primary Health Centre at Pernem. The accused did not summon and examine the said

Dr. Satish Pednekar but the Medical Certificate-Exh.55 produced through Dr. Swamy/DW1 shows that the accused was examined on 8-5-2002 but at the time of examination no history of any sort given by the accused was recorded on the said Medical Certificate-Exh.55. Dr. Deelip/DW2 examined the accused on 10-5-2002 and at that time he noticed a haematoma on the right thumb and another haematoma on the right mid thigh and a sutured CLW which according to Dr. Deelip/DW2 was sutured by Dr. Satish Pednekar. Dr. Sapeco/PW11 examined the accused on 8-5-2002 but at about 1.30 p.m. Dr. Swamy/DW1 has not been able to state as to who had referred the accused to the upgraded Primary Health Centre at Pernem either on 8-5-2002 or 10-5-2002 but Dr. Sapeco/PW11 has produced a letter written by Shri Mapari/PW16 at Exh.27 to show that he had examined the accused at the request of the said Police Inspector. According to Dr. Sapeco/PW11 he found that the accused was of robust athletic built. He also found that the accused was having a stitched lacerated wound on the frontal eminence of the scalp and according to Dr. Sapeco/PW11 the accused told him that after assaulting his neighbour Gurudas M. Gawas he ran away to Hadus at Goa-Maharashtra border and when Police jeep stopped

near the hiding place he ran away and thus sustained the injuries due to the violent fall at about 3.30 a.m. of 8-5-2002. There is no doubt that the accused on being examined by Dr. Deelip/DW2 on 10-5-2002 gave history of assault with danda on 7-5-2002 at around 7.30 p.m. It is submitted on behalf of the accused that the explanation of Dr. Deelip/DW2 be accepted as sufficient explanation to falsify the case of the prosecution. In my view, such an explanation cannot at all be accepted, for as already stated, the accused himself when he was examined under Section 313 of the Code did not even whisper anything as to the cause of the injuries on him. Not only that, the accused did not lodge any complaint at any time as regards the alleged incident. The accused also did not give the history of the said injury to Dr. Satish Pednekar when the accused was examined on 8-5-2002, and if any history the accused had given, the said Dr. Satish Pednekar would have certainly recorded the same on Certificate-Exh.55. On the contrary, the accused at the earliest opportunity explained the cause of the said injuries to Dr. Sapeco/PW11 namely that they were caused as he fell down when he attempted to run on seeing the Police jeep. The said version of the accused as given by him to Dr. Sapeco/PW11 is

sufficiently corroborated by Shri Mapari/PW16 and has got to be accepted. The evidence of Dr. Rajan/DW3 is of no use to the case of defence. All that Dr. Rajan/DW3 stated is that the deceased was brought to Goa Medical College on 7-5-2002 at 7.10 p.m. and he was declared as brought dead, and, therefore was transferred to the Forensic Department. Dr. Sapeco/PW11 upon the post mortem examination found that the deceased was having a chop cut injury of 13 x 8 x 8 cms. on the right lower fourth back of thigh directed medially and downwards, 8 cms. above the crease of knee joint with protrusion of chopped hem muscles, directed obliquely from inner to outer aspect and from left to right and upwards. According to Dr. Sapeco/PW11 the death of the deceased was caused due to hemorrhagic shock vide the said injury which was caused by impact of chopped weapon and which was fresh at the time of death and was fatal in the ordinary course of nature. Dr. Sapeco/PW11 also stated that the said injury was at the back side of the right thigh and it was a stabbed injury. Dr. Sapeco also opined that in case a person with a heap of grass on his head along with pal koita on the said heap of grass falls on his back side, the said injury could not have been caused. In other words, the evidence of

Dr. Sapeco/PW11 is in conformity with the versions given by Ajit/PW4 as well as Dattaram/PW5 and militates against the defence put forward by the accused. The medical evidence led on behalf of both the parties therefore supports the case of the prosecution rather than the case of the accused, as put forward by the accused in the cross-examination of the prosecution witnesses.

10. That takes us to the evidence of the eye witnesses examined by the prosecution. Ajit/PW4 is no doubt a cousin of the deceased. According to him, on 7-5-2000 at about 6.30 p.m. he was returning with his cattle and when he reached near the common well, he saw the deceased also returning from his chilli plantation and was proceeding towards his house, with a bundle of grass on his head and Dattaram/PW5 was walking behind the deceased/Gurudas at a distance of about 25 to 30 meters and when the deceased/Gurudas reached near the said common well the accused came in front of him with a pal koita in his hand. According to him, the deceased had a towel wrapped on his waist and he asked the deceased "Kai re madan zalla" and pushed him and the deceased/Gurudas fell down and then the

accused lifted the pal koita with both his hands and gave a blow on the right thigh of the deceased/Gurudas. He also stated that when the accused pushed the deceased/Gurudas, the deceased/Gurudas asked him as to why he had pushed him down. According to him, the accused gave a forceful blow of pal koita on the thigh of the deceased/Gurudas and ran away towards his house after assaulting the deceased. According to him, Dattaram/PW5 and Santosh/PW7 went near the deceased/Gurudas and lifted him. He identified the slipper of the right leg/MO4 as belonging to the deceased/Gurudas and a pair of slippers/MO3 as belonging to the accused being the slippers which were lying at the place of incident. In cross-examination, he admitted that about two months prior to the incident there were disputes between the Gawas family and the family of the accused and prior to that their relations were cordial and although after filing of the complaints both the families were not visiting each other, they were in talking terms. Dattaram/PW5 stated that he was returning home at about 6.45 p.m. and had seen the deceased/Gurudas walking ahead of him at a distance of about 25 to 30 meters and the deceased/Gurudas was carrying a bunch of chillies and fresh grass on his head.

According to him, Ajit/PW4 was near the common well with his cattle and the accused came from the opposite direction, wearing a shirt and a towel around his waist and he was having a pal koita in his right hand and when the deceased reached near the well the accused also reached near him and they were in front of one another and at that time the accused caught hold of the deceased/Gurudas by his collar from the front asking him "Madan zalla?" and pushed the deceased/Gurudas who fell on the ground with his face touching the ground and thereafter the accused assaulted the deceased/Gurudas with the pal koita holding it with both his hands on his right thigh and the accused then ran with the said pal koita into his house which is about 15 to 20 meters from the place of incident. According to him, Ajit/PW4 rushed near the deceased/Gurudas and shouted for help and Santosh/PW7 came there and all three of them lifted the deceased/Gurudas and by that time people gathered. He identified the towel/MO8 of the accused but stated that he could not identify the pal koita of the accused. He identified the single slipper/MO4 as that of the accused and the pair of slippers/MO3 as those of the deceased. In his cross-examination it was brought to his notice that he had not stated in his

statement to the Police that the accused had caught hold of the collar of the deceased/Gurudas from the front and he could not give any explanation as to the said omission. It was also brought to his notice that he had not stated to the Police that the deceased had fallen down with his face to the ground and was unable to give any explanation as to the said omission. He denied the suggestion that anyone from the house of the deceased/Gurudas had hit a danda on the accused. Santosh/PW7 stated that he was in their cowshed putting grass to their cattle and he saw the deceased carrying a bunch of grass over his head returning from chilli plantation and when the deceased/Gurudas had reached near the well the accused came and said "kai re mandan zalla" and pushed him down by holding a bunch of grass and pulling it and whilst the deceased/Gurudas fell down, the accused assaulted the deceased/Gurudas on his right thigh back side and the deceased/Gurudas fell down and sustained bleeding injury and became unconscious. He further stated that the accused was wearing a short pant and a towel around his waist and was not wearing anything above and thereafter the accused went to his house from the back side door. He further stated that Ajit/PW4 and Dattaram/PW5 came

there and called other people and the deceased/Gurudas was shifted from the place to the main road and was taken by Laxminarayan bus and the deceased/Gurudas died on the same night. In cross-examination he admitted that his statement was recorded on 9-5-2002 and it was also brought to his notice that in his statement to the Police, he had not stated that the accused had pushed the deceased/Gurudas down by catching a bundle of grass and he could not give any explanation as to the said omission. In further cross-examination he admitted that he had told the Police that the deceased/Gurudas was assaulted by the accused with a koita when he was lying on the ground and the deceased/Gurudas had fallen down with his face upwards. He also stated that at Ibrampur, people who go to the fields carry a pal koita. He also admitted that the accused and his family members had lodged various complaints against them at Pernem Police Station.

11. Firstly, it is submitted on behalf of the accused that the statements of Ajit/PW4 and Dattaram/PW5 were recorded on 8-5-2002 whilst that of Santosh/PW7 was recorded on 9-5-2002 and therefore they have been recorded with delay when

otherwise they could have been recorded on the same day. It is further submitted that according to Ajit/PW4 himself, he had gone to the Police Station with his own clothes stained with blood and there is no reason why his statement could not have been recorded on that day. There is no doubt that the statement of Ajit/PW4 could have been recorded on 8-5-2002 but that by itself is not sufficient to discard the evidence either of Ajit/PW4 or for that matter Dattaram/PW5 or Santosh/PW7 whose statement was recorded on the next date i.e. on 9-5-2002. On this aspect reference could be made to the case of **Dr. Krishna Pal and another** v. **State of U.P.** ((1996) 7 SCC 194) wherein the Supreme Court has stated that in cases of inordinate delay in examining witnesses the convincing and reliable evidences adduced cannot be discarded. The Supreme Court also referred to the case of **Karnel Singh** v. **State of M.P.**((1995) 5 SCC 518) and observed that in case of defective investigation it would not be proper to acquit the accused if the case is otherwise established conclusively because in that event it would tantamount to be falling in the hands of an erring Investigating Officer. Considering that the statements of Ajit/PW4 and Dattaram/PW5 were recorded on 8-5-2002 i.e. almost on the

same day, if I may say so, and that of Santosh/PW7 on the next day, it cannot be said that there was delay in recording the statements of the said witnesses and therefore the submission on that score deserves to be rejected. The omissions pointed out in the evidence of Dattaram/PW5, or for that matter Santosh/PW7 are too insignificant to be attached any importance. That the said omissions are material omissions is a submission I am not inclined to accept. It is submitted on behalf of the accused that in case the accused confronted the deceased from the front and pushed him, the deceased could not have fallen with his face downwards but ought to have fallen with his face upwards and therefore the evidence of Ajit/PW4 and Dattaram/PW5 on that score has got to be rejected. I am not inclined to accept this submission as well, for it is shown by the prosecution that on that day the ground was slippery due to rain and the deceased was carrying a bundle on his head and being so it is quite probable that the deceased after loosing his balance fell with the bundle with his face downwards. As already observed, the medical evidence supports such a theory because the hit with the pal koita/MO6 was given at the back of the thigh of the deceased. It is also pointed out on behalf of the accused that as

per Ajit/PW4 the accused was wearing a banian and a shirt whilst as per Dattaram/PW5 the accused was wearing a shirt and towel and therefore it is contended that they had not seen the incident. That the accused was wearing a pant and a towel is a fact which has been sufficiently established by Joaquim/PW6, Santosh/PW7, Ragoba/PW1 as well as the I.O. Shri Mapari/PW16. Only because Ajit/PW4 stated that the accused was wearing a banian and shirt or Dattaram/PW5 stated that the accused was wearing a shirt and towel is in itself not sufficient to discard their entire evidence which is otherwise convincing. Likewise, the fact that there is no corroboration in their evidence as regards identification of the slippers of the accused/deceased, is no ground to reject their evidence in entirety. Dattaram/PW5 is an independent witness from the locality as it is nobody's case that at any time the accused or his family members had filed any complaint against him. The variation, if any in the evidence of Ajit/PW4, Dattaram/PW5 or Santosh/PW7 pertains to very minor details and the said variation is not sufficient to discard their evidence as of witnesses who were not present. As already stated Ajit/PW4, Dattaram/PW5 and Santosh/PW7 are all residents of

the same locality and therefore they were natural and probable witnesses to the incident. It is true that there were complaints against Ajit/PW4 and Santosh/PW7 but even if their evidence is scrutinized on that count closely, their evidence still remains reliable and trustworthy. It is true that Santosh/PW7 stated that the deceased/Gurudas fell with his face upwards but that could be due to the weight of cross-examination. The evidence of Ajit/PW4 and Dattaram/PW5 shows that they were present at the time of the incident and Santosh/PW7 reached there immediately. The presence of the aforesaid three witnesses is established by each one of them and not only that, their presence is further supported by the evidence of the other witnesses as well. For example, Rajaram/PW2 stated that Sainath/PW9 came to the hotel where he was, and told him that the accused had assaulted his brother. Sainath/PW9 in turn stated that after hearing the noise from his house he had proceeded in the direction of the noise where Ajit/PW4 told him that the deceased/Gurudas was assaulted with pal koita. This further confirms the presence of Ajit/PW4 at the scene. Sainath/PW9 further stated that he went to the tea shop where Rajaram/PW2 was sitting and told him about the incident. The

evidence of Sainath/PW9 cannot be brushed aside as hearsay as contended on behalf of the accused. The said evidence is relevant under Section 6 of the Indian Evidence Act, 1872. Prashant/PW10 stated that he was returning home from his property along with Raghoba/PW1 and whilst passing from the back side of the house of the accused they heard noise and they went back at a distance of 10 steps and saw the accused running into his house from the back side and he was having a pal koita in his hand. He also stated that the accused was wearing a half pant and a towel around his waist. He identified the pal koita/MO6 as belonging to the accused. The evidence of Prashant/PW10 adds sufficient corroboration to the evidence of the said three eye witnesses, referred to herein above. Shamsundar/PW14 stated that after hearing the noise near the well he came out of his house and he ran to the well where he saw people gathered near the well and he questioned the people as to what had happened and he was told that the accused had assaulted the deceased/Gurudas with pal koita. He also stated that he saw the deceased/Gurudas lying on the ground with injury on the right hip on the back side. It is well settled, as stated by the Apex Court in the case of **State of U.P.** v. **M. K.**

Anthony(AIR 1985 SC 48) that while appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinise the evidence more particularly keeping in view the deficiencies, draw-backs and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies of trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate Court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial Court and unless there are reasons weighty and formidable it would not be proper to reject

the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals. Cross examination is an unequal duel between a rustic and refined lawyer. It is otherwise a common human experience that different persons admittedly witnessing an event give varying account of the same and that is because perceptiveness varies and a recount of the same incident is usually at variance to considerable extent. Ordinarily, if several persons give the same account of the event, even with reference to minor details, the evidence is considered to be the outcome of tutoring. It is not expected that the witnesses who saw the incident would describe it with the same words and in the process of description there are bound to be some minor errors here and there but on that count alone the entire evidence of a witness cannot be rejected. The discrepancies which do not shake the basic versions of a witness can be discarded and that is precisely the case at hand. Suffice it to say that the evidence of Ajit/PW4 and Dattaram/PW5 as well as Santosh/PW7 have a ring of truth around it. They are the most natural and probable

witnesses to the incident since the incident took place in the locality they were all residing. In any event, the so-called strained relationship between Ajit/PW4 and Santosh/PW7 with the family of the accused was not such that they would otherwise falsely implicate the accused. The learned trial Court had rightly considered that Dattaram/PW5 could be considered as an independent witness and he had totally corroborated the evidence of Ajit/PW4 and Santosh/PW7 and that the evidence of the said eye witnesses was also corroborated by the medical evidence.

8. The case of the prosecution is also based on circumstantial evidence and the first circumstance proved by the prosecution is as regards the recovery of the pal koita/MO6 at the instance of the accused. The I.O.Shri Mapari/PW16 stated that on 9-5-2002 during interrogation the accused showed his willingness to show the pal koita i.e. the weapon of assault and he recorded the said statement in konkani language in the presence of two panch witnesses. He has described the manner in which the said koita was subsequently recovered. Prakash/PW8 has substantially corroborated the version of the

I.O.Shri Mapari/PW16. As per Prakash/PW8 the accused was brought before them on 9-5-2002 at 9 a.m. and the accused was questioned and on being questioned the accused had stated that he had assaulted the deceased/Gurudas with the pal and he had kept the said pal on the mezzanine floor of his house and that he would show the same. Although the first part of the statement of Prakash/PW8 would be inadmissible, the evidence of Prakash/PW8 shows that the said pal koita/MO6 was recovered at the instance of the accused on being led by him to his house and on the mezzanine floor where it was kept. In cross-examination, Prakash/PW8 stated that on the date when his evidence was recorded P.I.Shri Mapari/PW16 had read over to him the panchanama and he was told to depose "as has been read out to him". It is contended on behalf of the accused that Prakash/PW8 gave his evidence in Court on being tutored by P.I. Shri Mapari/PW16 and therefore the evidence of Prakash/PW8 ought to be rejected. Section 159 of the Indian Evidence Act, 1872(Act, for short) provides for refreshing of memory of a witness and states that a witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned,

or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory. It also states that the witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct. In other words, if Prakash/PW8 wanted to refresh his memory while under examination in the witness box, he could have always referred to the said panchanama, to refresh his memory, in terms of Section 159 of the Act. However, in this case it is seen that prior to going into the witness box, P.I. Shri Mapari/PW16 read over the panchanama to him so as to refresh his memory and also told him to depose "as has been read out to him". The question is whether the said statement of Prakash/PW8 is sufficient to conclude that Prakash/PW8 was a tutored witness. The evidence of Prakash/PW8 shows that he was an independent witness and he deposed not because he was told to depose as per what was read out but otherwise because he was present at the time of the panchanama. There is nothing in his evidence even to remotely suggest that he was a person who had deposed because he was obliged to depose in the manner as told to him by P.I. Shri Mapari/PW16. In my view, only because the memory of

Prakash/PW8 was refreshed previously, before he entered the witness box and was told by the I.O.Shri Mapari/PW16 to depose in the manner recorded in the panchanama would not be sufficient to discard his evidence which otherwise is found to be convincing and reliable. Prakash/PW8 also identified the pal koita/MO6 before the Court as the weapon recovered at the instance of the accused. The said pal koita/MO6 was also identified by Ajit/PW4, Santosh/PW7 as well as Prashant/PW10. Relying on a decision of this Court in the case of **Asaram Rangnath Jadhav and another** v. **State of Maharashtra**(2004 ALL MR(Cri)1201) it is submitted that the identification of the said pal koita/MO6 could not have been accepted in the absence of previous test identification parade moreso because a pal koita like MO6 is an implement used by all the villagers. As already observed, the witnesses examined particularly Ajit/PW4, Santosh/PW7 and Prashant/PW10 are all close neighbours of the accused and the deceased/Gurudas and it is nobody's case that the pal koitas used by others were of the same shape or size as that of the accused. Rustic villagers do have an uncanny knack to identify the things which belong to them and viewed thus, the identification of the said pal koita/MO6 by the aforesaid

witnesses could not be faulted for the first time before the Court, in the absence of a prior test identification held as regards the identification of the said pal koita/MO6. Common experience shows that those who are familiar with their implements seldom have difficulty in picking them out from a number of similar implements because they are familiar with them and the identification by them can certainly be approached with great degree of confidence. The said pal koita/MO6 was also sent to CFSL, Hyderabad, and the report shows that it had the human blood on it. It is contended on behalf of the accused that no blood group has been mentioned in the report of the CFSL and in the absence of mentioning of the blood group it could not be said that the blood which was found on the said pal koita/MO6 was that of the deceased. This controversy is now settled by a Division Bench of this Court in the case of **Shiri @ Shrikant Gaunkar** v/s **State of Goa**(unreported decision dated 7-8-2006 in Criminal Appeal No.26/2005) wherein it was observed thus:

> "The Supreme Court in the case of **Kuji** v. **State of M.P.**(1991 (3) SCC 627) speaking through 3 learned Judges distinguished

> the case of Kansa Behera(supra) and held that finding of human blood on weapon and clothes of accused can be a material circumstance in the absence of determination of blood group and merely because the Serologist could not determine the blood group in his report the circumstance of find of human blood stains cannot be said to be of no consequence. The same view is followed in **Guru Singh** v. **State of Rajasthan**(2001(2) SCC 205) by stating that mere doubt sought to be created on the non mention of dimension of blood stains by itself was not sufficient, as the accused is entitled only to reasonable doubt. Because the blood group was not ascertained, the recovery made at the instance of the accused cannot be discarded is also the view taken by the Supreme Court in **Motiram G. Pawar** v. **State of Maharashtra**(2002(4) Crimes 64), relying on 2 other decisions referred to therein".

The recovery of the koita at the instance of the accused is a formidable circumstance proved by the prosecution.

9. The next circumstance is again the finding of the

human blood on the towel/Exh.8. As per I.O. Shri Mapari/PW16 the accused was brought to Pernem Police Station and at the time of arrest panchanama in the presence of Joaquim/PW6 and Anant was drawn and a knicker/short pant of ash colour having side pockets and a towel/Exh.8 were attached. Joaquim/PW6 was examined by the prosecution and he had stated that he was called for the panchanama at about 4.30 a.m. on 8-5-2002. He has stated that the accused was wearing an ash colour half pant/MO7 and a towel around his waist/MO8 which were dirty and the said half pant and the towel were packed and sealed by the Police. He identified the said short pant/MO7 and the said towel/MO8. It is pointed out on behalf of the accused that the short pant/MO7 had only one pocket, as stated by him and therefore it could not have been the short pant seized by the I.O./Shri Mapari/PW16. However, it is also to be stated that Joaquim/PW6 has stated that the said pant/MO7 had two pockets. It is true that Joaquim/PW6 did not notice any injuries on the head of the accused and there is also no mention about the said injuries in the arrest panchanama/Exh.18. Certainly the fact that the accused had injuries ought to have been reflected on the arrest panchanama and ought to have been deposed to by

Joaquim/PW6. However, in my view, only because Joaquim/PW6 failed to notice the said injuries on the person of the accused or for that matter P.I. Shri Mapari/PW16 did not take care to record the said injuries on the arrest panchanama would not be sufficient to discard entirely either the evidence of Joaquim/PW6 or for that matter of I.O.Shri Mapari/PW16 since otherwise I.O.Shri Mapari/PW16 has stated that the accused had the said injuries. Otherwise, there is nothing in the evidence of Joaquim/PW6 to doubt his credibility, in any manner. Joaquim/PW6 owns a bar in front of the Pernem Police Station where he also resides and was called at early hour of the morning to act as a panch witness. There is nothing in his cross-examination to discredit his evidence. The said half pant/MO7 and the towel/MO8 were sent to CFSL, Hyderabad, and the report shows that human blood was detected both on the half pant/MO7 and the towel/MO8 but the blood group could not be ascertained on the half pant/MO7 but the blood group on the towel/MO8 was B. The prosecution has proved through the evidence of Dr. Indrani Pal/PW12 that the blood group of the deceased was 'B' Rh positive and that of the accused was 'A' Rh positive. The finding of the blood of the blood group of the

deceased on the towel/MO8 worn by the accused at the time of the assault is another formidable circumstance to connect the accused with the assault on the deceased.

10. The evidence of eye witnesses as well as the circumstantial evidence discussed herein above overwhelmingly proves that it is the accused who assaulted the deceased/Gurudas with the pal koita as the deceased/Gurudas was returning from his field with a bundle of grass/leaves on his head. The conviction of the accused, therefore, per se could not be faulted. As already stated, the accused was charged and tried under Section 302 I.P.C. but the learned Sessions Judge has convicted and sentenced the accused under Section 304(I) I.P.C. In reducing the conviction as well as the sentence, the learned Sessions Judge has referred to Exception 3 under Section 300 I.P.C. However, it has been conceded, on behalf of the accused, that what would be applicable in fact is Exception 4 and not Exception 3. Exception 3 to Section 300 I.P.C. provides that culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and

causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused. Exception 4, on which reliance is now sought to be placed provides that culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner. On behalf of the prosecution, it is contended that the case at hand is covered by Secondly to Section 300 of I.P.C. which provides that culpable homicide is murder, if the act by which the death is caused is done with the intention of causing bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused and therefore there should not be scope for further reduction.

11. On behalf of the accused, reliance has been placed on the cases of **Chowa Mandal and another** v. **State of Bihar** and **Ramu** v. **State of U.P.** reported in (AIR 2004 SC at pages 1603 and 1605) respectively. The first case shows that two accused while returning back came across the deceased and the accused

were enraged by unwanting questioning by the deceased and the accused wielded lathis and gave a single lathi blow on the head of the deceased. The Supreme Court in the facts of the case, observed that the incident in question had occurred on the spur of the moment without there being any intention of causing death or of causing such injury as they knew was likely to cause death, and was an act arising out of the enmity they had with the nephew of the deceased and aggravated by the unwanting questioning by the deceased. The Supreme Court therefore held that there was no justification for conviction under Section 304 r/w 34 I.P.C. and therefore modified the conviction under Section 326 r/w 34 I.P.C. In the second case, the accused was a member of an unlawful assembly and was alleged to have inflicted fatal injury by spear on the abdomen of the deceased. The Apex Court considered that there was no motive and the incident was old and therefore reduced the conviction from Section 304 I.P.C. to Section 326 I.P.C. and reduced the sentence of three years R.I. There is no principle that in all cases of a single blow Section 304 I.P.C. is attracted. At times even Section 302 I.P.C. could be attracted and at other times Section 326 I.P.C. The question with regard to the nature of offence has to

be determined on facts and in the circumstances of each case. The nature of the injury, whether it is on the vital or non vital part of the body, the weapon used, the circumstances in which the injury is caused and the manner in which the injury is inflicted are all relevant factors which may go to determine the required intention or knowledge of the offender and the offence committed by him. In the case at hand, the learned Sessions Judge has observed that the evidence on record did not indicate that the accused had come armed with the pal koita with an intention of inflicting injury on the deceased and that on the contrary the evidence of Santosh/PW7 indicated that the villagers from Ibrampur who go to the paddy fields usually carry a pal koita and the fact that the accused had come with the pal koita would not indicate that it was a premeditated murder. The learned Sessions Judge also observed that the evidence indicated that there was enmity between the accused and the deceased and his family members and it is possible that in view of the said enmity the accused on seeing the deceased lost his temper and it was at the spur of the moment and the heat of passion that the accused inflicted the blow of the pal koita on the thigh of the deceased/Gurudas without any premeditation and the fact that

the accused inflicted only a single blow of pal koita would indicate that he did not act in a cruel or unusual manner. At the same time, the learned Sessions Judge observed that the pal koita when used as a weapon of offence can cause bodily injury which was likely to cause death and the fact that the accused inflicted a forcible blow with the sharp end/blade of the pal koita would indicate that the accused would very well know that such an injury was likely to cause death and therefore the offence came within the definition of culpable homicide not amounting to murder punishable under Section 304(I) I.P.C.

12. I am unable to agree with all the observations made by the learned Sessions Judge. It might be that the villagers from Ibrampur usually carry pal koitas when they go to the fields but it was nobody's case that anyone at that time was going to the fields and on the contrary most of the villagers had already returned and the deceased was in the process of returning. It was also not anyone's case that the accused casually met the deceased, as the former was going with the pal koita. On the contrary, the evidence clearly suggests that the accused came from his house with the said pal koita and questioned the

accused with words "kai re madan zala" and then pushed him and struck a deadly blow with the said pal koita with both his hands which led to the death of the deceased. The deceased had every right to question the accused as to why the accused had pushed him and this certainly could not have enraged the accused. The facts of the case clearly disclose that the accused came from his house armed with the said pal koita/MO6 with a view to assault the deceased and did push him down and after the deceased/Gurudas fell on the ground assaulted him on his thigh. It is true that the accused did not assault the deceased on any of his vital parts but it is stated by Dr. Sapeco/PW11 that the injury caused was sufficient in the ordinary course of nature to cause death. In the case of **State of Punjab** v. **Gurcharan Singh** (1998 CRI.L.J. 4560) the incident had taken place on the spur of the moment and there was no motive for committing the offence and the accused had given only one blow in the sudden quarrel which took place between him and the deceased and the Supreme Court concluded that the order convicting under Section 304(I) was proper. Since Dr. Sapeco/PW11 has opined that the injury inflicted by the accused was sufficient in the ordinary course of nature to cause death and since it was caused

by a deadly weapon and with force by both hands, in my view, the intention of causing such bodily injury as is likely to cause death has got to be attributed to the accused and thus, in my view, there is no scope either to reduce the conviction from Section 304(I) to Section 304(II) I.P.C. and thus reduce the sentence from seven years R.I. to the period undergone by the accused.

13. For the reasons stated hereinabove, I find there is no merit in this appeal. Consequently, the same is hereby dismissed with no order as to costs.

N. A. BRITTO, J.

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